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No. 388

# In the Supreme Court of the United States

OCTOBER TERM, [redacted]70

MARSHALL P. SAFIR ET AL., PETITIONERS

*v.*

ANDREW GIBSON ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE GOVERNMENT RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The first opinion of the court of appeals (Pet. App. 70a–79a) is reported at 417 F. 2d 972; the court's two subsequent opinions (Pet. App. 7a–17a; and Pet. App. 1a–3a) are unreported. The district court's first opinion (Pet. App. 79a–85a) is reported at 297 F. Supp. 630; its second opinion (Pet. App. 19a–21a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on February 26, 1970. Timely petitions for rehearing were denied on June 18, 1970. A petition for a writ of

certiorari was filed on July 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the determination of the Federal Maritime Commission that a shipping conference violated Section 15 of the Shipping Act, 1916, by setting unfairly low rates designed to, and which did, divert business from a non-conference carrier, required the Maritime Subsidy Board of the Maritime Administration to terminate the subsidies paid to the conference carriers under the Merchant Marine Act, pursuant to Section 810 of that Act.

## STATUTE INVOLVED

Section 810 of the Merchant Marine Act of 1936, 49 Stat. 2015, 46 U.S.C. 1227, provides:

> It shall be unlawful for any contractor receiving an operating-differential subsidy under subchapter VI of this chapter or for any charterer of vessels under subchapter VII of this chapter to continue as a party to or to conform to any agreement with another carrier or carriers by water, or to engage in any practice in concert with another carrier or carriers by water, which is unjustly discriminatory or unfair to any other citizen of the United States who operates a common carrier by water exclusively employing vessels registered under the laws of the United States on any established trade route from and to a United States port or ports.
>
> No payment or subsidy of any kind shall be paid directly or indirectly out of funds of the United States or any agency of the United

States to any contractor or charterer who shall violate this section. Any person who shall be injured in his business or property by reason of anything forbidden by this section may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

STATEMENT

This is an action brought by Sapphire Steamship Lines, Inc., and two of its officers and stockholders, seeking to compel the Maritime Administrator and members of the Maritime Subsidy Board (a part of the United States Department of Commerce)[1] to take action pursuant to Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. 1227, against shipping companies which are members of a shipping conference known as the Atlantic and Gulf American Flag Berth Operators (AGAFBO).

Sapphire began operations as an unsubsidized water carrier in March 1965, and undercut the rates of sev-

[1] The functions now performed by the Federal Maritime Commission and by the Maritime Subsidy Board of the Maritime Administration were originally vested in the United States Maritime Commission. By Reorganization Plan No. 21 of 1950, 64 Stat. 1273, and Reorganization Plan No. 7 of 1961, 75 Stat. 840, the regulatory functions of the U.S.M.C. were transferred to the Federal Maritime Commission, an independent agency, and the U.S.M.C. functions relating to the award, amendment, and termination of subsidy contracts were transferred to the Maritime Administration, a part of the Department of Commerce.

eral carriers which were AGAFBO members. Shortly afterwards, AGAFBO reduced its rates on those routes on which its members competed with Sapphire. As a result, Sapphire lost business and subsequently went out of business in March 1967. It was adjudged a bankrupt in May of that year (Pet. App. 70a). On March 1, 1966, AGAFBO had raised its rates to their former levels.

After a broad investigation on its own motion of "virtually the entire spectrum of practices surrounding the procurement of ocean transportation of U.S. military cargoes" (Pet. App. 23a), including the events outlined above, the Federal Maritime Commission issued a report (Pet. App. 22a–65a), concluding, that (Pet. App. 53a–54a):

> [AGAFBO's] reduced rates were simply an attempt to deprive Sapphire of some of the cargo which Sapphire expected would be generated by its rates. And AGAFBO, by its means of its reduced rates, did in fact deprive Sapphire of the nucleus cargo which was indispensable to Sapphire's profitable operation. Under these circumstances, we find that the AGAFBO agreement, through its ratemaking functions, operated in a manner which was knowingly at odds with the requirements of section 18(b)(5) [of the Shipping Act, 1916, as amended, 46 U.S.C. 817(b)(5)] and which was detrimental to the commerce of the United States and contrary to the public interest as well. AGAFBO's rates were detrimental to commerce because they were designed to and did have a disastrous effect on Sapphire [footnote omitted]. AGAFBO's rates were contrary to the public interest because

> they were predatory in nature and in derogation of an important aspect of the public interest, the policy to foster competition to the extent compatible with the regulatory purposes of the [Shipping] Act. * * * We therefore conclude that the AGAFBO agreement operated in a manner which was in violation of section 15 [of the Shipping Act, 46 U.S.C. 814].

Shortly after the Commission issued this report, Sapphire wrote to the Maritime Subsidy Board requesting that subsidy payments to AGAFBO members be terminated and that action be instituted pursuant to Section 810 of the Merchant Marine Act of 1936, 46 U.S.C. 1227, to recover subsidies paid since March 29, 1965, the date the AGAFBO carriers reduced their rates. The Board did not take action upon this request.

Sapphire then commenced this action in the district court, asserting that the AGAFBO carriers had violated Section 810 by the rate reductions which had driven Sapphire out of business, and that that Section required the Board to cut off any subsidies then being paid to any AGAFBO carriers and to start a legal action to recover those subsidies already paid after March 29, 1965, the date the tainted rate reductions went into effect (Pet. App. 86a–92a). The district court dismissed the complaint. The Second Circuit reversed, holding: first, that Sapphire and its owners had standing to question the Board's failure to seek recovery of subsidies pursuant to Section 810 (opinion of September 26, 1969, Pet. App. 70a, 77a); second, that Section 810 authorized the Board to withhold subsidy payments (or to recover back payments)

only for the period during which a violation of the section was taking or had taken place (Pet. App. 77a); and, finally, that, with respect to the discretion of the Board to invoke Section 810, the Board "may not refuse to proceed against the AGAFBO lines without at least considering the interest of the victim * * *. There may be other limits on [its] discretion, but we need not decide this now" (Pet. App. 78a–79a). The court remanded the case to the Board so that the latter could "give clear indication that it has properly exercised the discretion with which Congress has endowed it" (*ibid.*).

Upon remand, the Board started an administrative proceeding, on notice to all concerned parties, to determine whether Section 810 sanctions should be invoked against AGAFBO carriers (Pet. App. 20a). At this point, Sapphire moved in the district court for an injunction restraining the Board from making any further subsidy payments to the carriers. Sapphire claimed that the court of appeals had held that the Board was compelled to invoke Section 810, and that the carriers were not entitled to receive further subsidy payments until they had refunded the payments made during the seven-month period when AGAFBO's reduced rates had been in effect. The district court denied this motion (Pet. App. 19a–21a), and Sapphire again appealed.

On this second appeal, the court of appeals (opinion of February 26, 1970; Pet. App. 7a–17a) upheld the district court's denial of an injunction (*id.* at 7a–8a), but held that the Commission's finding that the AGAFBO carriers had violated Sections 15 and 18(b)

(5) of the Shipping Act had the effect of conclusively determining, for the purposes of the Maritime Subsidy Board's proceeding then in progress, that the AGAFBO carriers had violated Section 810 of the Merchant Marine Act. The court of appeals reached this conclusion on the basis of the similarity of the operative language of Section 810 to that of Sections 15 and 18(b)(5), and of the fact that of the two agencies, the Commission rather than the Board "has the expertise to pass on whether rates are unfair or unduly discriminatory * * *" (Pet. App. 14a). But the court of appeals made it clear, in a footnote, that it was not requiring the Board to impose the Section 810 penalties upon the AGAFBO carriers (Pet. App. 17a, n. 2):

> Nothing we have said should be read as preventing the [Board] from investigating the nature and extent of the individual carriers' participation in the illegal action, should it find these matters relevant to its ultimate decision on whether to seek recovery of subsidies paid during the violation and, if so, how much and from whom.

Shortly after this opinion was rendered, the AGAFBO carriers moved to intervene and petitioned the court of appeals for rehearing. After permitting intervention and obtaining further briefs from the parties, the court denied rehearing.[7] In an accompany-

[7] The AGAFBO carriers had argued that the Commission's determination of their violation of Sections 15 and 18(b)(5) of the Shipping Act should not work a collateral estoppel in the Board proceedings, because the Commission made its determination after the violations had ceased. For that reason, the carriers asserted, they had no incentive to seek court review of the

ing opinion (June 18, 1970; Pet. App. 1a-3a), the court again stressed that in its February 26, 1970 opinion, it had expressly refused to hold that the Board was bound to invoke the Section 810 remedy against any of the AGAFBO carriers: "We directed only that the issue whether the reduction of the rates was unjustly discriminatory or unfair to Sapphire was not to be relitigated before the [Board] * * *" (Pet. App. 3a).

## ARGUMENT

The court of appeals' holding that the Maritime Subsidy Board was not obligated to invoke the Section 810 remedy on the basis of the Commission's finding of violation of Sections 15 and 18(b)(5) was correct. There is no conflict among the circuits as the decision below is the first appellate ruling construing Section 810. Furthermore, review of the decision below at this point is premature as the Board is presently in the process of determining whether to invoke Section 810 against the AGAFBO carriers.

1. Sapphire asserts in essence that *any* violation of Section 15 of the Shipping Act determined by the Commission automatically requires the Board to invoke the Section 810 penalties cutting off subsidies for the period of the violation. It is our basic position that

Commission's findings. The court rejected this argument, pointing out that the findings of Shipping Act violations had carried the possibility of $1000-per-day penalties, and that, indeed, the United States had later obtained settlements of claims based on the Sections 15 and 18(b)(5) violations of $25,000 from each offending carrier (Pet. App. 2a). The possibility of imposition of these penalties, the court held, provided sufficient incentive to seek review of the Commission's findings.

the Board has discretion to determine whether and when to invoke Section 810 against particular carriers, even after the Commission has determined that Section 15 has been violated.

Section 15 allows the Commission to disapprove, cancel, or modify "any agreement [among members of a conference] * * * that it finds to be unjustly discriminatory or unfair as between carriers * * *." Such an agreement may violate the statute even though the resulting discrimination or unfairness was not willful. *Unapproved Section 15 Agreement-Coal to Japan/Korea*, 7 F.M.C. 295, 303–304. Furthermore, there is great flexibility in the civil penalty provisions of Section 15, which permits a penalty of "not more than $1000 for each day such violation continues * * *." 46 U.S.C. 814.

By contrast, the penalty created by Section 810 is inflexible as it bars all subsidy payments for at least the period of the violation. Although the violation here was willful, petitioner's argument would require that the Section 810 penalty be imposed for any violation of Section 15. There is no indication that Congress intended Section 810 to have such a harsh result: the legislative history discussed by the court of appeals suggests that this section was intended to cover only willful violations (Pet. App. 74a–75a). Even for such violations, the Board has discretion to determine whether, in light of the basic policies underlying the Merchant Marine Act, the particular circumstances call for the termination of subsidy.

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That Act provides (46 U.S.C. 1101):

"It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall

2. Review of the issue now would be inappropriate. The Board is conducting a proceeding to determine whether the Section 810 sanctions should be invoked here. Upon completing that action and making the "considered decision" directed by the court of appeals (Pet. App. 79a), the Board may invoke the remedy, thus rendering unnecessary further consideration of the issue pressed by Sapphire. Moreover, the record and Board decision will further illuminate the proper application of the statute. Finally, there is no showing that issue is sufficiently important to warrant review by this Court; the decisions below are the first reported appellate opinions on the point, even though the Merchant Marine Act of 1936 has been on the books for almost 35 years.

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have a merchant marine fleet sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping services on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine."

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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